

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

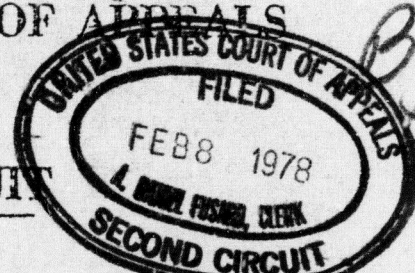
To be argued by Dermot G. Foley.

77-6179

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT



EARL P. HOPPER, JR., by his father and next friend, EARL P. HOPPER, SR.; MICHAEL J. BOSILJEVAC, by his wife, next friend and Conservator-Guardian, MARY K. BOSILJEVAC; ROBERT A. BRETT, JR., by his father, next friend and Guardian-Conservator, ROBERT A. BRETT, SR.; NICHOLAS G. BROOKS, by his father and next friend, GEORGE L. BROOKS; SHELDON D. SCHULTZ, by his father, next friend and Trustee (Guardian), GEORGE A. SCHULTZ; DONALD E. SHAY, JR., by his father, next friend and Guardian, DONALD E. SHAY, SR.; JONATHAN B. BEDNAREK, by his father and next friend, JOHN BEDNAREK; VINCENT A. CHIARELLO, by his mother and next friend, ANNE CHIARELLO; JOSEPH PETER FANNING, by his wife and next friend, LINDA FANNING; PAUL O. MEDER, by his wife and next friend, JANE M. MEDER; JOHN F. O'GRADY, by his father and next friend, JOHN M. O'GRADY; LEONARD ROBERTSON, by his father and next friend, STRUAN ROBERTSON; PHILIP CRAIG, by his brother and next friend, JOHN P. CRAIG; BRENT E. DAVIS, by his father and next friend, RUSSELL H. DAVIS, JR.; HARLEY H. HALL, by his wife and next friend, MARY LOUISE HALL; DONALD F. LINDLAND, by his wife and next friend, BARBARA ANN LINDLAND; JAMES M. ROZO, by his father and next friend, SAMUEL ROZO; CHARLES E. SHELTON, by his wife and next friend, DOROTHY M. SHELTON; ROBERT L. STANDER WICK, by his wife and next friend, CAROLYN STANDERWICK; MICHAEL B. VARNADO, by his father, next friend and Curator (Guardian), HOUSLEY VARNADO; and MILTON J. VESCELIUS by his wife and next friend, JEANENE VESCELIUS,

Plaintiffs-Appellants,

-against-

JAMES E. CARTER, JR., President of the United States; HAROLD S. BROWN, Secretary of Defense; JOHN C. STETSON, Secretary of the Air Force; CLIFFORD L. ALEXANDER, Secretary of the Army; and W. GRAHAM CLAYTOR, JR., Secretary of the Navy,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS.

KAPLAN, KILSHEIMER & FOLEY
Attorneys for Plaintiffs-Appellants
122 East 42nd Street
New York, New York 10017

TABLE OF CONTENTS

	PAGE
Preliminary Statement	1
FACTS:	
The So-Called "Montgomery Report" Has No Authoritative Weight ...	1
Appellees' Brief Suffers From Misleading Selectivity In Its Reference To The Record	3
POINT I - Appellants Will Be Deprived Of Constitutionally Protected Interests And Rights Should They Be Declared Dead	14
A. <u>McDonald v. McLucas</u> Did Not Determine The Issues Raised Herein (Answering Appellees' Point I A, pp. 9-11)	14
B. Appellants Would Be Adversely Affected By A Determination Of Death (Replying To Appellees' Point I B, pp. 11-14)	15
C. The Constitutional Requirements Of A Hearing Is Ignored. (Replying To Appellees' Point I C, pp. 14-17	17
POINT II - The Court Below Was In Error On The Issue Of Threatened Irreparable Injury (Replying To Defendants-Appellees' Point II, pp. 17-18)	19
CONCLUSION	23

TABLE OF AUTHORITIES

CASES:

<u>Bell v. U.S.</u> , 366 U.S. 393 (1961)	16
<u>Crone v. U.S.</u> , 538 F.2d 875 (Ct. Cl., 1976)	14,15,16
<u>Goldberg v. Kelly</u> , 397 U.S. 254 (1973)	18
<u>Haynes v. Metropolitan Life Insurance Company</u> , 277 A. 2d 251 (Court of Appeals, MD, 1971)	20
<u>Jacobsen's Estate, In re</u> 143 N.Y.S. 2d 432 (Surr. Ct. Kings Cty. 1955)	20
<u>Matthews v. Eldridge</u> , 424 U.S. 319 (1976)	17
<u>McDonald v. McLucas</u> , 371 F.Supp. 831 (S.D.N.Y., 1974), aff'd. mem. 419 U.S. 987 (1974)	5,6,14,15,16,18
<u>Rawley v. United States</u> , 277 F.Supp. 817 (S.D. Ill., 1967)	21
<u>Weinbender's Estate</u> , 110 N.Y.S. 2d 895 (Surr. Ct., Schenectady County, 1952)	21
<u>Union Pacific Railroad Co. v. U.S.</u> , 91 F.Supp. 762, 117 Ct. Cl. 534 (1950)	3

OTHER AUTHORITIES:

Michigan C.L.A. 720.501	20
Minnesota Statutes 600.24 <u>et seq.</u>	20
Oklahoma Statutes 58-713	20
N.Y. C.P.L.R. 4527	20
26 U.S.C. 6018	21
26 U.S.C. 6651	21
37 U.S.C. 552	17
10 U.S.C. 2771	5
Montgomery Committee Hearings and "Report"	1,3,7,8,9,11,12

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
EARL P. HOPPER, JR., etc., et al., :

Plaintiffs-Appellants, :

-against- :

JAMES E. CARTER, JR., etc., et al., :

Defendants-Appellees. :

77-6179

-----X
PLAINTIFFS-APPELLANTS' REPLY BRIEF

PRELIMINARY STATEMENT

This is an appeal from an Order of the United States District Court for the Eastern District of New York denying an application for a preliminary injunction. Plaintiffs-Appellants have heretofore filed a main brief. Defendants-Appellees have filed an answering brief. This brief is in reply to that answering brief.

FACTS

The So-Called "Montgomery Report"
Has No Authoritative Weight

With a covering letter dated January 30, 1978, Appellees' counsel delivered to the Clerk of this Court documents purporting to

be "two full sets of the Hearings (Parts 1 through 5) and Final Report of the United States House of Representatives' Select Committee on Missing Persons in Southeast Asia". As stated in the said covering letter, these documents are, indeed, "cited to at great length in defendants-appellees' brief".

To our dismay, we discovered that the purported "full sets" are in fact incomplete in that there are omissions of significant material which had been brought to the attention of defendants' counsel on numerous occasions.

As can be seen from page (II) of the Montgomery Report, the Committee was composed of ten (10) Congressmen. The dissenting opinions of Representatives Moakley, Gilman and Guyer are printed at pages 255 through 259 of the said Report. During the evidentiary hearing, it was established conclusively that, in this form, the "Report" is incomplete because it failed to show the dissenting opinions of two other members of the Committee, Rep. Ottinger and Rep. Lloyd. A-475-477, 822-824. This was also confirmed in the record by a copy of a letter from Rep. Moakley to President Carter. A-276-277. Finally, these omissions were again confirmed, with supporting exhibits, in the Supplemental Reply Affidavit of Dermot G. Foley, sworn to January 16, 1978, which was submitted to this Court on our recent application for a stay pending appeal. Consequently, the omissions from Appellees' submission cannot be regarded as accidental and cannot be excused upon the grounds that the omitted materials were not known to exist.

These omissions are crucial. They establish that five of the ten members of the Committee dissented. Therefore, the Committee's members were exactly, evenly divided and a majority vote could not be found on any of the propositions for which the Montgomery Report has been cited as authority in Appellees' brief.

The mere fact that somebody had the temerity to cause this material to be printed by the Government Printing Office, without the required approval of the Committee membership, does not give it any added authority. As former Chief Judge Jones recognized in Union Pacific Railroad Co. v. U.S., 91 F.Supp. 762, 117 Ct. Cl. 534 (1950) calling a billygoat a horse, did not make him one. The Montgomery "Report" does not now represent anything more than one side of an argument in which ten Congressmen were evenly divided. The five dissentors are surely entitled to at least as much credance as are their opponents on the Committee, whose viewpoint, the Appellees now seek to endow with the force of law.

Appellees' Brief Suffers From Misleading
Selectivity In Its References To The Record.

A comparison of the briefs filed by Appellants and Appellees might lead one to wonder if they both arose from the same lawsuit. While Appellants' brief discusses the record in detail to show the specific instances where testimony offered and submitted in the District Court

* Further, the published "Hearings" involve only the public sessions of the Committee. However, there were also at least 20 executive sessions as well as "international talks" and "investigations". Montgomery "Report" pp. 3 and 5. Hence, the record offered is necessarily a mere fragment of the basis for the dispute within the Committee.

confirmed the constitutional and legal wrongs alleged in the complaint and established the existence of a threat of irreparable harm, Appellees' brief responds by intimating that no such evidence exists. One or other of the two briefs must be in error in this regard.

We have noted that, with one exception, Appellees' brief does not challenge or dispute the actual claims made in Appellants' brief. That one exception occurs on page 14 of Appellees' brief where it is claimed that we made a "blatant misrepresentation" of the record. This refers to material on pages 14 and 16 of Appellants' brief. We suggest that when the Court reviews the material referred to in Appellants' brief, it will discover not only that no misrepresentation whatever was made, but further, that the Appellees have confused matters by incomplete references to the record in their discussion. On page 16 of Appellants' brief, it is stated that a Government witness "seemed to confirm" other evidence respecting a Vietnamese contention that a determination of death under the Missing Persons Act liberates them from a duty to account. We referred specifically to testimony which appears in the record at A-664, 665. Appellees transpose "confirm" to "conceded" and then refer only to the pages A- 666-669, 589. Further, in a footnote they discuss the record at page A-667.

In short, the alleged "blatant misrepresentation" does not exist. We stand by our brief which is supported by the record to which it correctly refers. Otherwise, Appellees have not challenged or contradicted the specifics in Appellants' brief.

The Appellees' brief contains many factual mistakes, and selectively chosen authority. Within the space confines of a Reply Brief, it is not possible to deal with all of these. However, we shall discuss some of the more outstanding examples. At page 4, they claim that where there is no next-of-kin receiving benefits, notice and an opportunity to attend a status review is afforded to other "primary next-of-kin" as if they were receiving benefits. As authority, 10 U.S.C. § 2771 is cited. This statute has nothing to do with the matter - it refers solely to the distribution of a serviceman's assets through a settlement of accounts, after a determination of death. Appellees' brief, also, seeks support in five particular references in the record. The first, A. 491-494, contradicts Appellees' contentions and limits rights only to those primary next-of-kin who have such rights under the rule of McDonald v. McLucas, 371 F.Supp. 831 (namely, next-of-kin who are recipients of governmental benefits). The witness testifying at that portion of the record, Col. Gratch, thereafter, attempted to use Plaintiffs' Exhibits 8 and 10 to show that other persons have rights. However, upon examination it developed that this was unfounded (A-531-533). This same witness made a very telling distinction, which does not appear in the Appellees' brief, between the right to "attend" and the right to "participate" at a proceeding. Those permitted to attend do not thereby gain the right to participate - they merely witness the event. (A-535, 538).

Appellees, also, rely on page 609 of the Appendix. Here, Commander Colgan stated that some provision exists for notice and hearing

beyond that required under the McDonald rule. However, this is merely a matter of alleged policy. His testimony also shows that the Navy follows the same pattern revealed in the testimony of Col. Gratch. (A-608-610). There was no showing that any such policy had the force of regulations or other authority that is, in fact, followed. Indeed, quite the contrary was the case in instances such as O'Grady (see testimony at A-331 et seq.) and Davis (see A-912 et seq.).

Next, Appellees cite A-625 which shows only that the Marine Corps operate in essentially the same manner as the Navy and the Air Force.

Finally, Appellees refer to A-628. Here, Major English testified, on behalf of the Army, that notice, under the regulations, goes to the recipient of governmental benefits, and, if none, then to the primary next-of-kin. However, the regulations are in the record and they do not say this. (A-136) The regulations state merely that the Secretary may give certain rights to primary next-of-kin if there are no recipients of governmental benefits - not that he must, nor that he will. Major English added that the Army functions substantially the same as the Navy (A-628) and that, in practice, no one has rights except recipients of governmental benefits. (A-630)

Another example of selectivity appears on page 4 of Appellees' brief where it is claimed that the "case file" is made available, prior to proceedings which lead to determinations of death, "to those persons entitled to notice and an opportunity to be heard". This implies that those who wish to oppose determinations of death are given access to the real

facts. But this is not the case. The persons "entitled" are only recipients of governmental benefits. In our main brief, we demonstrated that the "case file" is only one of several files on a particular man (Appellants' brief, 25, 26, 27) and that it is incomplete (Appellants' brief, 25, 26, 30-33). At pages 30-32 of our main brief, we refer to the testimony showing that the files are updated and altered immediately before a status review and at page 26, it was pointed out that the family which allegedly got copies earlier are not given these updated materials.

On pages 4 and 5, Appellees' brief contends that the "case file" contains all of the information relating to the man's status. But each source cited by Appellees specifies that it was limited to the information which was "received by" the particular armed services branch involved. The testimony of Col Gratch dealt at length with the inadequacies of the information "received by" the various branches. See Appellants main brief, pages 25-28. Furthermore, the problems respecting information not contained in the "case file" are discussed at Appellants' brief page 26, 30-33. Thus, discussion which implies that the "case file" contains all of the necessary and relevant information is misleading.

Finally, to support this contention, the Appellees referred to the Hearings and "Report" of the Montgomery Commission and to the files maintained in the cases of the plaintiffs, Bosiljevac and Brooks. (Pl. Exh. 11 a, b; Def. Exh. B) The inadequacies of these files were covered in the testimony in great detail (A-337-434 and 435-461). The reference to Part III, page 12 of the Montgomery hearings does not support the contention

for which it is used by the Appellees. This refers to testimony by Dr. Roger Shields to the effect that information in the casualty files is "hopefully" also in the file maintained by the Joint Casualty Resolution Center ("JCRC") file. He added that some information in the JCRC file, however, does not get into the casualty file. This does not mean that either of these files are complete and, in fact, it is clear that they are not. (See Appellants' brief, pages 31-33) The reference to the Montgomery Report, page 177, is also misleading. In limiting its discussions to "information relating to his status" the excerpt from the Montgomery Report could be correct inasmuch as questions of status are strongly influenced by the incompleteness of casualty files. It is also clear that of over 2500 cases (A-793-812) the Appellees' brief admits that the Montgomery Committee only looked at 200 files (Appellees' brief, page 14, n. 9). Thus, the Montgomery Committees' inquiries were less than exhaustive or persuasive.*

On page 5 of the Appellees' brief, there is another misleading statement. Appellees contend that all of the files are carefully reviewed "to insure that all of the information available anywhere in government is there". This is flatly untrue and the record is clear on that point (See Appellees' brief, pages 30-31). There are numerous sources of information from which help is not sought (A-521-524, 528). Furthermore, the review of files, referred to in Appellees' brief, is merely of the "casualty file", which, it has been abundantly established, is incomplete and undependable.

* However, even the Montgomery "Report" recognized that the files made available to the families were "intentionally and deliberately" falsified and that, when families questioned this, Service representatives retreated into "vagueness and obscurantism"- p. 160.

For further support, Appellees' cite the Montgomery hearings, Part I, page 17 and Part III, page 12. The material at Part I, page 17 is testimony by Mr. Seiverts before the Montgomery Committee in which he claimed that there is no "file on any man... that has not been reviewed with the greatest care to see whether there is information in the files or elsewhere in our system that should or shouldn't be in that file". Obviously, this does not prove that the information is, in fact, in the file.

The reference to Montgomery Committee hearings, Part III, page 12, has already been discussed above and also does not establish that the "casualty files" contains all of the information that is available - indeed, it indicates that some material in the JCRC file is omitted from the "casualty file".

Finally, Appellees claim in a footnote that there is "no mass of unexamined material", but that there is "a lot of general reports which do not pertain to anyone in particular and have not been put in anyone's file". For this they cite Montgomery hearings, Part I, page 42, and Part III, page 12. However, it was indisputably established that there is a great deal of unexamined material - in particular, the so-called "uncorrelated" documents. See, the discussion at Appellants' brief, pages 31-32. Also, see A-321-323, 523-524, 670-672. Finally, the Montgomery Report itself, at page 69, reported that there were literally hundreds of thousands of such documents, which it lacked the ability to understand or examine.

Appellees' brief in footnote 5, Page 5, claims that because of

declassification, the files now contain the original source documents, as well as the extracts of formerly classified material. This is plainly untrue. See Appellants' brief, pages 32-33.

One of the most significant misstatements in Appellees' brief, can be found on page 6. There it is claimed that "a member's status is not changed unless the evidence is overwhelming that he is dead". But, the testimony at the evidentiary hearing established that there is no standard applicable to such decisions and that the only guide is the "subjective reaction" of whoever happens to review the file. As a result, a wide range of incompatible criteria were testified to by various unqualified, non-lawyer witnesses during the evidentiary hearing. See Appellants' brief, pages 38-39.

At pages 6-7 of Appellees' brief, the claim is made that if a man returns alive, after being the subject of a faulty determination of death, he will get a refund of lost pay and allowances and interest on money that would have been deposited into a bank account for him had he not been wrongfully declared dead. As explained at pages 10-13 of Appellants' brief, the best that can be said for this is that it is a mere discretionary possibility, of doubtful legality, which does not purport to cover all of the losses sustained by the serviceman due to a faulty determination of death.

At page 7 and at page 14 of Appellees' brief, there is an attempt to create the impression that no real progress is being made in negotiations towards an accounting nor has any been made for years and, hence, that speculation as to the fate of MIA's is necessary. But Plaintiffs Exhibit 26 established that an accounting could be rendered in well over half of the

cases still outstanding. A-793. Furthermore, the State Department's witness, Frank Sieverts, clearly testified that, since the trip to Hanoi by the Woodcock Commission, negotiations have progressed and have become productive. This is discussed in Appellants' brief, pages 37 and 41.

Mr. Sieverts is also cited by the Appellants for testimony claiming that our Government remains committed to getting an accounting regardless of the status of the individual missing men. This ignores the vital need for cooperation of the Vietnamese who regard determinations of death as liberating them from their duty to account. See Appellants' brief, pages 14-16. The affidavit of Stephen R. Frank, on this matter, is subjected to a variety of disparaging speculation on page 13 of Appellees' brief. However, among the many who have spoken with the Vietnamese since 1973, no one has ever obtained any statement or other evidence from them to rebut the Frank affidavit. In other words, to use language which Appellees seem to find acceptable, there is no credible evidence, apart from the wishful speculation on page 13 of Appellees' brief, to counter the testimony set forth in the Frank affidavit.

This differs substantially from the threadbare statement at page 8 of Appellees' brief that "our Government has no evidence that any serviceman is alive and being held against his will in Southeast Asia". In this case, the statement is misleading because it is incomplete. The complete truth is that our Government lacks knowledge one way or another and does not know whether individuals are dead or alive. A-276-277. Also, Montgomery Committee Report, page 255.

Another misstatement in Appellees' brief can be found on page 8 where it is contended that "many" MIA families "desperately want" determinations of death, but feel that it is "cruel and unhuman" to require them to initiate these proceedings. This, we submit, is a cheap fiction. There is not and cannot be a "desperate" need on anybody's part for a federal determination of death because a State Court determination, under State Enoch Arden laws is always available if the case actually warrants such a determination. Appellees' indicate that "many" families are involved - but they fail to deal in numbers. We are equipped to do so. This matter has been submitted to a vote among the POW/MIA families repeatedly over the years. A certification of the outcome of one such vote is contained in the record and shows a vote of 498 against 8 in opposition to the position which the Appellees take. (A-887-888). In fact, those few persons who hold contrary views are but the usual dissidents to be found in any organization.

For example, they cite the statement of Mrs. Maerose Evans, quoted in the Montgomery Committee Report. They should know better. It was established during the evidentiary hearing that Mrs. Evans is totally atypical in that she is a wife who not only received proof of the death of her husband but also the physical delivery of his remains. (A-479). She is simply not facing the situation of other families and is not representative of them.

Another source relied upon by Appellees is an MIA mother, Mrs. Powers, who claimed before the Montgomery Committee, that those opposing determination of death were merely a "few" of the MIA family members. This is demonstrably untrue. (A-887-888). The situation was manifestly the direct opposite to what she said.

This "desperate" need argument is completely without merit. In view of the fact that determinations of death may be obtained under State law, which completely satisfies any personal needs, such as a desire to remarry, no need can be shown for a federal determination of death which expunges the rights of the missing serviceman. Under these circumstances, any claim of a "desperate" need for such a determination must be questioned. Finally, Appellees' position is self-contradictory. It implies that there are many people who feel inhibited about expressing a desire for a determination of death, and who, nonetheless, are proclaiming to the World that they wish that the Government would get one for them.

Appellees' attempt at page 8 to minimize inadequacies of the casualty files of Bosiljevac and Brooks. But lengthy and detailed testimony established these inadequacies (A-337-434 (Bosiljevac) and A-435-461 (Brooks)) and that these were typical cases. (A-434, 478, 686). Judge Weinstein's characterization of these discrepancies and files is simply unsupported. However, his comments, made on the morning of the first day of the four-day evidentiary hearing, were, to say the least, unfortunate. We submit that it was inappropriate to dismiss discrepancies as significant as those shown in the testimony of this case by remarking that such discrepancies exist in every substantial case. A-396. Further, it was disappointing to see evidence of incomplete, piece-meal recordkeeping, which prejudices the defense of MIA rights, merely attributed to "the nature of life". A-399-400. Such comments from the bench so early in the proceeding, lend credance to the belief that the matter, unfortunately, was prejudged, as discussed in Appellants' brief at pages 42 and 43.

POINT I

Appellants Will Be Deprived Of
Constitutionally Protected Interests
And Rights Should They Be Declared Dead

A. McDonald v. McLucas Did Not Determine
The Issues Raised Herein (Answering
Appellees' Point I A, pp. 9-11)

Appellees claim that McDonald v. McLucas, 371 F.Supp. 831 (S.D.N.Y., 1974), aff'd mem. 419 U.S. 987 (1974) holds that MIAs have no rights to notice and a hearing but that such rights are restricted to their dependants who are receiving governmental benefits. This, of course, is an attempt to relitigate an issue which the Government raised and lost decisively in Crone v. U.S., 538 F.2d 875, 887 (Ct. Cl., 1976). McDonald did not adjudicate the rights of the MIA's themselves.

The issue has been discussed at pages 54 thru 59 of Appellants' brief. We recognize that in reviewing the similarities and dissimilarities between the present case and McDonald, a copy of the McDonald complaint would be helpful. Therefore, we intend to furnish copies of that complaint to this Court since it is not contained in the Joint Appendix.

Such a comparison will confirm the analysis made on page 55 of Appellants' brief.

We respectfully submit that no amount of relitigation will upset the logical conclusions of the Crone case on this issue. It is one thing to appreciate the rulings that actually were made in McDonald but it is absurd to suggest that rulings were made by that Court on issues which it expressly stated it had not even considered (371 F.Supp. 831, 837) or that aspects of the case which were dismissed on standing grounds (371 F.Supp. 837, 840) were ever considered on the merits.

B. Appellants Would Be Adversely Affected
By A Determination Of Death
(Replying To Appellees' Point I B, pp. 11-14)

Appellees assert that to invoke due process guarantees, Appellants must show a threat to a protected property interest. Such an interest they claim is lacking. The "sole purpose" of sections 555 and 556, they say, is to afford some support to the relatives of servicemen.

In so saying, Appellees have both misconstrued the Missing Persons Act itself and blithely swept aside related impacts upon the serviceman unfortunate enough to be pronounced dead. It is clear error, and a total disregard of well established law, to assert that the "sole" purpose of the Missing Persons Act is to afford support to the family of the serviceman. The very cases cited by Appellees demonstrate their error. The most recent such case, Crone v. United

States, 538 F.2d 875 (Ct. of Cl., 1976), tackled the problem of who had standing to sue under the Act in the United States Court of Claims.

The Court of Claims, in Crone, did dismiss all claims except those of dependants. However, this was most definitely not based on a finding that MIAs lack personal interests affected by determinations of death. Rather, the dismissal was on standing grounds - the Court of Claims, unlike this Court, does not recognize "Next Friend" standing. 538 F.2d 875, 881. The Court went on, however, to point out, in footnote 4, page 881, that a fiduciary formally "appointed by a judicial tribunal" or "authorized by Statute" could act. Obviously then, when the Crone court observed, at page 882, that the "primary purpose" (not the "sole purpose" as Defendants-Appellees contend) of the Missing Persons Act was to aid dependants, it did not intend to infer that there are no beneficiaries of the Act other than dependants of MIA's.

While, in dicta, McDonald does refer to "sole purpose" (371 F.Supp. 831, 833) it does so in the context of considering only the rights of dependants and, as authority, it cites Bell v. U.S., 366 U.S. 393, 408 (1961) which spoke of "primary purpose" and not of "sole purpose".

Finally, the fact that the existence or non-existence of dependants has no real bearing on the entitlement of MIA's to pay and allowances can be seen from the fact that the statute requires

that they be paid in either case. 37 U.S.C. §552. The Act clearly requires, and has always been construed to require the continuation of pay and allowances during missing or captured status regardless of whether the subject servicemen have dependants or not.

C. The Constitutional Requirements Of A
Hearing Is Ignored. (Replying
To Appellees' Point I C, pp. 14-17)

The rules of the respective Services now afford an informal, non-adversarial interview with an officer or a panel who reads a brief summary and, perhaps, the file and makes a recommendation as to the determination to be made. Defendants-Appellees, relying on Matthews v. Eldridge, 424 U.S. 319 (1976) contend such an interview is a constitutionally adequate hearing. But, their reliance is misplaced. Matthews deals with the right to receive disability benefits. Should these be cut off, there would be some hardships which the Court felt would be mitigated by other sources of income and assets. In an MIA case, on the other hand, a federal determination of death is used in state court as prima facie evidence of death. As a result, estates are distributed, insurance paid and so on. The state court implications of a determination are discussed more fully below. Suffice it to say here, that the impact on the MIA's property will be great. Even if he could receive his back pay, as the recipient in Matthews can receive back disability pay, it would not help. For, here, there is much extra loss occasioned by a determination of death. As the Court in Mathews itself said "the degree

potential deprivation that may be created by a particular decision is a factor to be considered in assessing the validity of any administrative decisionmaking process" (at 341). The potential deprivation to the MIA is far greater than to the disability payments recipient. Accordingly, the MIA should be given a fuller hearing - a hearing with Goldberg type safeguards.

Significantly, in considering the strictly derivative rights of MIA dependants, which are affected only when the source rights of the MIA's are terminated, it was held in the McDonald case (371 F.Supp. 831, 834) and affirmed by the Supreme Court (419 U.S. 987) that the standards of Goldberg v. Kelly, apply. See Appellants' brief at page 58.

In view of the record in this case, we see little point, with the page limitations which govern this brief, in detailed discussion of the four alleged criteria listed at pages 15 and 16 of Defendants-Appellees' brief. To contend, as they do at the top of page 15, that the recipient of governmental benefits acts as an adequate fiduciary for the MIA is preposterous. For example, can it be claimed that this was so in the case of Brent Davis? A-912-916. It is undisputable that the Government is well aware of the danger of interest conflicts and has done nothing to safeguard against them. Furthermore, it may well be irrelevant to speculate about whether it is malice or ignorance or whatever that leads to the destruction of an MIA's rights. The Fifth Amendment contains no exceptions permitting

deprivation of protected interests without due process of law on the basis of the motives which caused such deprivations.

At pages 16 and 17 of their brief, Defendants-Appellees claim that determinations of death are based on consideration of "all the information available" and "all of the evidence". As explained at length in Appellants' brief, and above in this reply brief, the record establishes the direct opposite. By such misstatements they seek to imply that standards and criteria are applied. Well, what are these standards and criteria? Several witnesses, and particularly Major Matt Marshall of the Marines, proved that they were non-existent. See Appellants' brief, pages 19-20 and 38-39.

POINT II

THE COURT BELOW WAS IN ERROR
ON THE ISSUE OF THREATENED
IRREPARABLE INJURY
(Replying To Defendants-Appellees'
Point II, pp. 17-18)

In their cursory treatment of the issue of threatened irreparable injury Defendants-Appellees toy with the absurd when they portray a determination of death as an event that occurs in a vacuum. The injuries which flow from these determinations were made known to the parties and to the District Court and are discussed in some detail at pages 9-17 and 50-54 of Appellants' brief.

It cannot be open to reasonable argument that following a military determination of death, which is evidenced by a military death certificate, taxing authorities, creditors and heirs can and do require the distribution of the assets of the "deceased". Never were the implications more pertinent of that well-known axiom: "Where there is a will there is a relative".

Under the law of most states, a determination of death affects the rights of the serviceman. The law of New York is in no way atypical. In this state, "written finding of presumed death, made by any person authorized to make such findings by the federal missing persons act is prima facie evidence of the death, and the date, circumstances and place of disappearance" N.Y. C.P.L.R. 4527. See also, for example, Michigan C.L.A. 720.501; Minnesota Statutes 600.24 et seq.; Oklahoma Statutes 58-713. Based upon a federal determination of death, state courts have ordered payment of civilian life insurance policies and granted letters of administration of the missing person's estate. In re Jacobsen's Estate, 143 N.Y.S. 2d 432 (Surr.Ct., King's County 1955), see also Haynes v. Metropolitan Life Insurance Company, 277 A.2d 251 (Court of Appeals, MD, 1971).

A serviceman declared dead, then, stands to lose his estate, his insurance policies, and all his worldly goods. There is no provision for recapture or reimbursement. This so-called

"military pay statute" (defendants' brief, p. 17) does indeed devastate the soldier's assets. Its application clearly leads to irreparable injury.

A determination of death also imposes a requirement that estate tax be paid. Rawley v. United States, 277 F.Supp. 817 (S.D. Ill., 1967). Since the Internal Revenue Service is a "department or agency of the United States", the determination of death is conclusive as to it. Failure to promptly pay the tax results in additional penalties and interest charges. 26 U.S.C. 6018, 6651. This requirement compels that the estate administration get underway. Once underway, it must continue until the assets are dispensed to creditors and beneficiaries. In re Weinbender's Estate, 110 N.Y.S. 2d 895 (Surr. Ct., Schenectady County, 1952).

In short, once a military determination of death is made and a military death certificate issued, taxing authorities, creditors and heirs all have the power and ability to compel distribution of the subject's assets. This is a sure and completely predictable consequence of a determination of death. Hence, it is absurd to suggest that nothing but military pay is involved.

These are the injuries that this lawsuit is about. This is plain not only from the record that was made, but even from the complaint. Defendants-Appellees may find it convenient to limit discussion

future
to the/rights of those men who are not only subjected to unlawful and unconstitutional determinations of death, but who, in addition, survive thereafter and return alive to eventually present claims. If the Defendants had been granted the privilege of writing the complaint, perhaps that would have been the case they would have chosen to litigate.

However, this case involves wrongs and injuries that are occurring now and it was, we submit, error not to treat the case accordingly in the District Court.

It was also error to reject the testimony of Mrs. Sullivan (A-328-331) which was offered to show that, even when each element of "evidence" used to produce a determination of death was demonstrably false, the Defendants refuse to rectify the wrong that they committed (A-485).

It was not error, however, for the District Court to receive testimony on the cost of opposing a determination of death. This was relevant because the invalidity of these determinations should lead to their rescission and this, in turn, may lead to subsequent legitimate proceedings as to status. Thus, there is an unnecessary and unjust duplication of costs due to the improprieties which this lawsuit seeks to end. This evidence was also relevant because it shows why many MIA families cannot afford the tremendously high cost of seeking due process in the face of the Defendants' persistently unconstitutional and arrogant behavior.

CONCLUSION

The denial of a preliminary injunction amounted to error and an abuse of discretion. Appellees' brief has shown nothing to the contrary. The order below should be reversed and a preliminary injunction granted.

Respectfully submitted,

KAPLAN, KILSHEIMER & FOLEY
Attorneys For Plaintiffs-Appellants
122 East 42nd Street
New York, New York 10017
(212) 687-1980

OF COUNSEL:

Dermot G. Foley, Esq.
John A.K. Bradley, Esq.

2/7/78

77-6179

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

On February 6, 1978 I served the within Plaintiffs-Appellants Reply Brief upon the office of the United States Attorney for the Eastern District of New York, Counsel for the Defendants-Appellees herein, at 225 Cadman Plaza East, Brooklyn, N.Y.C., the address designated by said attorneys for that purpose, by depositing ~~2~~ true copies of same enclosed in a post-paid properly addressed wrapper in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

DERMOT G. FOLEY

Sworn to before me this
6th day of February, 1978.

LEO KAPLAN
Notary Public, State of New York
No. 31-7158500
Qualified in New York County
Commission Expires March 30, 1978